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8  
9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 EDNA GOYA, an individual,

12 Plaintiff,

13 vs.

14  
15 MERCK & CO., INC., a New Jersey  
corporation; MCKESSON  
16 CORPORATION, a Delaware corporation;  
Does 1-100

17 Defendants  
18

Case No. 06-CV-2574-H (AJB)

**PLAINTIFF'S RESPONSE IN  
OPPOSITION TO DEFENDANT  
MERCK & CO., INC.'S MOTION TO  
STAY PROCEEDINGS**

Date: January 16, 2007  
Time: 10:30 a.m.  
Dept.: Courtroom 13, 5<sup>th</sup> Fl.  
Honorable Marilyn L. Huff

19  
20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. INTRODUCTION**

22 Defendant Merck ("Merck"), absent joinder by Defendant McKesson Corporation  
23 ("McKesson"), has moved this Court to stay proceedings based upon the argument that  
24 several other Fosamax cases have been transferred to the MDL, and as such, if a stay is not  
25 granted, Merck will be prejudiced, but Plaintiffs will not. Merck is wrong.

26 **II. STATEMENT OF THE CASE**

27 Merck removed the instant case to this Court based solely on a claim of jurisdiction  
28 due to complete diversity (28 U.S.C. § 1332). While several other cases have been

1 transferred, some of the transfers were opposed and no remand rulings on the merits have  
 2 been made in California. Here, as the Court may be aware, Plaintiffs are challenging the  
 3 transfer based upon the fact that in this case, Defendant McKesson is not a sham defendant  
 4 as we have a clear ruling in the California JCCP for Vioxx, where Merck's sham joinder  
 5 argument regarding McKesson was expressly denied. Now, Merck wishes to obtain a stay  
 6 with no legal support, claiming only that this issue is being raised before the JPML, and  
 7 therefore, this Court has no legal nor equitable right to hear the removal challenge.

8 Plaintiff incorporates by reference her concurrently filed Motion to Remand, and the  
 9 accompanying Declaration of Amy M. Boomhouwer and Memorandum of Points and  
 10 Authorities in Support thereof.

### 11 **III. ARGUMENT**

#### 12 **A. The Federal Court Has No Subject Matter Jurisdiction**

13 In the first place, Merck must demonstrate it is entitled to the stay, irrespective of  
 14 whether the JPML has made in the past, or will make in the future, any decisions regarding  
 15 who is better able to decide California removal issues. For removal based on diversity, 28  
 16 U.S.C. § 1332 requires complete diversity of citizenship. Morris v. Princess Cruises, Inc.,  
 17 236 F.3d 1061, 1067 (9th Cir. 2001). Even if the complete diversity requirement is met as  
 18 between Plaintiff and Defendants, removal is not allowed where one of the defendants is a  
 19 "citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). Joinder of a  
 20 resident defendant is only fraudulent if the plaintiff fails to state a cause of action against that  
 21 defendant and the failure is obvious according to the settled rules of the state. McCabe v.  
 22 General Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987).

23 Plaintiffs will not reargue the law as it pertains to diversity. The removing defendant  
 24 has the heavy burden of alleging and proving the non-diverse party's joinder is "sham" or  
 25 "fraudulent." Jernigan v. Ashland Oil Co., 989 F.2d 812, 815-816 (5th Cir. 1993); Boyer v.  
 26 Snap-On Tools Corp., 913 F.2d 108 (3rd Cir. 1990).

27 It is apparent that Merck feels that it has met its burden just because Merck expects  
 28 this case to be listed on a conditional transfer order shortly. The facts are that regardless of

1 what the JPML has done in other matters, we now have a clear statement of California law  
 2 from Judge Chaney of the California Superior Court, that McKesson as a distributor is not  
 3 a sham defendant. The factual and legal bases upon which she made her decision are the  
 4 same here. Therefore, this Court is without jurisdiction and there is no need to stay the case.

5 **B. Merck Cannot Meet The Legal Test For Granting A Stay**

6 When deciding whether to issue a stay, the Court must address three factors: (1) the  
 7 possible damage resulting from the stay, (2) the hardship or inequity to the party required to  
 8 go forward, and (3) the orderly course of justice measured in terms of simplifying or  
 9 complicating the issues. CMAX, Inc. v. Hall, 300 F. 2d 265 (9th Cir. 1962). In this regard,  
 10 the party seeking the stay must sufficiently demonstrate it will suffer the harms above listed.

11 Id.

12 Merck argues it will be prejudiced if a stay is not granted and that plaintiff's  
 13 "legitimate" interests are unaffected by a stay. The thrust of Merck's argument is that it will  
 14 "substantial hardship" from Plaintiff's aggressive litigation strategy to be employed while  
 15 awaiting for transfer to the MDL. Unfortunately, there is no support or evidence whatsoever  
 16 for Merck's allegation or fear. Merck makes no argument that it will suffer any economic  
 17 damage other than that it may be forced to begin litigating sooner than later nor does Merck  
 18 cite a single example of an inconsistent ruling.

19 Additionally, Merck does not attempt to identify Plaintiff's "legitimate" interests, but  
 20 instead argues the benefits of coordination. Unfortunately, as the law in California with  
 21 respect to McKesson is clear that it may be sued as a distributor of a defective product, it is  
 22 Plaintiff who will suffer substantial hardship and prejudice to all of her interests when she  
 23 is unable to bring her California claims in a California Court as she is entitled to. Merck has  
 24 failed to meet its burden for an order staying the proceedings.

25 Merck, in other Fosamax cases, has stated it wants Plaintiffs to wait for Judge Keenan  
 26 to rule on remand, suggesting that he will promptly set a briefing schedule. To address this  
 27 argument at the outset, Plaintiff directs the Court to a review of the docket for *In Re: Vioxx*  
 28 *Products Liability Litigation*, MDL Docket 1657 (U.S.D.C. E.D. LA), which indicates that

1 for over a year and a half no decision on any pending remand motions has been made and  
 2 there is no indication it will be decided in the near future. This is an example of why Merck  
 3 wants the stay and Plaintiffs do not, as only Merck benefits by delay.

4 There is also no indication when the case will be raised in the JPML. Merck states that  
 5 it gave tag-along notice on December 6, 2006 but a conditional transfer order has not yet  
 6 issued. Plaintiff intends to oppose transfer with the JPML and therefore fears a sizeable  
 7 delay before the transfer issue is resolved one way or another.

8 **C. McKesson Has Not Joined The Application For Stay**

9 It must be again noted that to date, McKesson has not joined in the removal fray.  
 10 That is dispositive. Merck cannot argue for relief if McKesson has not indicated an express  
 11 or implied acquiescence in the Notice of Removal, as is mandated by 28 U.S.C. § 1446(b).  
 12 It is hard to imagine it would also be entitled to a stay if, by law, it must lose on removal.

13 **IV. CONCLUSION**

14 Merck has failed to sufficiently demonstrate any of the factors required for a stay.  
 15 Nonetheless, it wants this Court to stay all proceedings pending an order from the JPML. A  
 16 necessary party to this Motion To Stay, McKesson is absent, and that is also fatal to a stay.  
 17 The equities and the factors weigh against a stay and in favor of the timely adjudication of  
 18 Plaintiff's Motion to Remand.

19  
 20 Dated: December 28, 2006

By: 

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 29, 2006, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following: **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT MERCK & CO., INC.'S MOTION TO STAY PROCEEDINGS**

I hereby certify that on December 29, 2006, a copy of the foregoing was mailed by United States Postal Service to the following:

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